



[2020] JMSC Civ 246

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2018HCV04986

BETWEEN NATALIE TENN

CLAIMANT/APPLICANT

AND WAYNE ANTHONY WILTSHIRE

DEFENDANT/RESPONDENT

IN CHAMBERS

Mr. Craig Carter instructed by A. McBean & Co., Attorneys-at-Law for the Claimant/Applicant.

Miss Kerry-Ann D. Sewell, Attorney-at-Law for the Defendant/Respondent.

Heard: November 30 and December 18, 2020

Matrimonial Property - Property Rights of Spouses Act (PROSA) - Application to make claim for division of matrimonial home after twelve months of dissolution of marriage - General considerations - Prejudice - Whether Respondent would be barred from claiming adverse possession of Applicant's interest in matrimonial home if time is extended to make PROSA claim.

C. BARNABY J, (AG)

INTRODUCTION

[1] This is an application to extend the time within which to make an application under the **Property Rights of Spouses Act (PROSA)**. The application is contained in the Amended Fixed Date Claim Form filed on the 13th May, 2020, some fifteen (15) years after the parties' divorce in 2005. They were married on 30th August 1986.

- [2] The substantive claim concerns property at 24 Kristan Circle, Cedar Grove Estate, Mandeville in the parish of Manchester registered at Volume 1195 Folio 545 of the Register Book of Titles (“the Property”). The parties are registered as joint tenants. While there is some dispute as to the circumstances under which the Property was acquired and the parties registered as joint tenants, there is agreement that it was acquired during their marriage and was the matrimonial home before the parties separated some time in 1997.
- [3] The Applicant relies on the Further Affidavit of Natalie Tenn in Support of Fixed Date Claim Form sworn and filed on the 9th August 2019; and the Respondent, on the Affidavit of Wayne Anthony Wiltshire sworn and filed on the 16th and 17th July, 2019 respectively.
- [4] At the contested hearing of the application on the 30th November 2020, and on the undertaking of Counsel to provide copies of their written submissions and authorities, judgment on the application was reserved to today’s date. Both Counsel were faithful in honouring their undertaking.

CONCLUSION

- [5] On consideration of the applicable law and the evidence presented, I exercise the discretion reserved to me to extend the time for making an application for the division of matrimonial property under **PROSA**. While there was no satisfactory reason for the long delay in making a claim under the Act, on the admission that the Property was the family home and the Applicant being one of two registered joint tenants on title, she has a *prima facie* meritorious claim to a share in it. Additionally, there would be no significant prejudice to the Respondent if the claim is allowed to be made at this time, thereby enabling the court to deal justly with the disputed matters between the parties, including any issue as to possessory acquisition of the Applicant’s share in the Property since the dissolution of the marriage.

REASONS

[6] Pursuant to section 13(2) of the **PROSA**, a spouse is entitled to make an application for the division of property within twelve (12) months of the dissolution of marriage or such longer period as the court may allow after hearing the applicant. Some fifteen (15) years have passed since the dissolution of the parties' marriage.

[7] The legislation makes no prescription as to the factors which the Court must consider on an application to extend the time within which to make an application. That notwithstanding, the matter has been the subject of judicial pronouncements and in that regard, both parties rely on the decision of Sykes, J (as he then was) in **Sharon Smith v Vincent Service** [2013] JMSC Civ 78. In that case permission was granted to file a **PROSA** claim four (4) years after the termination of cohabitation. The Judge in the course of his judgment referred to the decision of the Court of Appeal in **Allen v Mesquita** [2011] JMCA Civ 36 and concluded that

[13] ...limitation defences under PROSA should be upheld unless there is good reason not to do so. The court's starting point then should be in favour of the defence when it is raised and that benefit which accrued to the defendant should only be taken away on good reason being shown.

[8] Sykes J also relied on the decision of Morris JA (as he then was) in **Brown v Brown** [2010] JMCA Civ 12 [77]. On these authorities, the primary concern of the Court on an application such as the instant, is whether it would be fair to allow the application. In making that determination the court is required to consider:

(i) the *prima facie* merits of the case;

(ii) the length of the delay;

(iii) the reasons for the delay;

(iv) prejudice; and

(v) the overriding objective of enabling the court to deal with matters justly.

[9] The parties agree that the Property, acquired during their marriage and for which they are registered as joint tenants, was in fact the family home. It is in these circumstances that I conclude that the Applicant's claim for a division of the family home under **PROSA** is *prima facie* meritorious.

[10] Another consideration for the court is whether there was delay in making the application. It does not require any stretch of the imagination to conclude that a delay of fourteen (14) years in making an application under **PROSA** is a long one. As was stated by Sykes J in **Smith v Service**,

[21] ... under the present law even if the parties were separated many years before PROSA, provided the applicant can satisfactorily explain the delay and there is no injustice to the defendant then a claim can be brought under the legislation.

[11] It was submitted on behalf of the Applicant that she has supplied a sufficient explanation for the delay of fourteen (14) years in making her application. I do not agree with that assessment of the Applicant's evidence as to delay. The substance of the evidence in this regard is that the Applicant had the responsibility of taking care of the two children of the marriage without help from the Respondent, which the Respondent denies; that the children, now adults are no longer dependent on her financially for their support and have shown no interest in returning to Jamaica; and that in consequence, she is now able to afford the legal costs in seeking a separation of her interest in the Property.

[12] While Counsel for the Respondent sought to impugn the Applicant's evidence as to delay on the basis of incredibility, there was no cross examination of the Applicant on the veracity of her evidence that she had the financial responsibility for the children without assistance from the Respondent. That evidence being

untested at this stage, I am prepared to proceed on the basis that the Applicant experienced some financial challenge.

- [13] On an application for extension of time within which to file an appeal, the court is also required to consider delay and the reasons therefore as the court is called upon to do here. Impecuniosity has been accepted in this jurisdiction as a good reason for delay in filing a notice of appeal where it has been sufficiently explained and warrants the exercise of the discretion to extend time. See for example, **Leymon Strachan v Gleaner Company Ltd and Dudley Stokes** (Motion No 12/1999, delivered 6 December 1999).
- [14] It is quite easy for a party who has failed to abide by procedural timelines which have been imposed by legislation or rules of court to claim impecuniosity when he asks the court to exercise a discretion it has in extending time. This can no doubt lead to abuse. It is for that reason that an applicant who approaches the court must convincingly demonstrate that impecuniosity caused the delay: **Alcron Development Limited v Port Authority of Jamaica** [2014] JMCA App 4. In my view, this is not accomplished by the Applicant merely stating that she was taking care of her children for the last fourteen (14) years; that they are no longer financially dependent on her; and she now has the means to pursue litigation. After the passage of so many years, I believe that something more is required.
- [15] In **Smith v Service** Justice Sykes, in dismissing a like argument, that of financial deficiency, stated at [29] that “... [t]here [was] no evidence Miss Smith sought to engage the Legal Aid Clinic which has reduced fees.” The same observation can be made here. There is no evidence of the Applicant having sought formal legal aid assistance or any other assistance in seeking to pursuing a **PROSA** application previously.
- [16] There has undoubtedly been a lengthy delay by the Applicant in seeking a division of the matrimonial home under **PROSA** and no satisfactory reason has been supplied for it. It is also acknowledged, as contended by the Respondent’s

Counsel that there is inherent prejudice to him in losing the limitation defence afforded to him by **PROSA**. However, I do not believe that these factors alone should operate as a bar to the exercise of the discretion reserved to the court to extend the time for making an application for the division of the matrimonial home. This is so, particularly having regard to the circumstances of this case.

- [17] In addition to the evidence of both parties that the property was their matrimonial home, they are registered on title as joint tenants. As a result of the latter fact, the Applicant here, like the applicant in **Smith v Service**, has a *prima facie* case in law and equity as to interest in the Property outside of the **PROSA**. As a joint tenant, the Applicant is at liberty to unilaterally sever that tenancy to realise a separate divisible share. It was aptly stated by Justice Sykes in **Smith v Service** that,

[24] ... It is well established that unless there is some reason or evidence to suggest the contrary, legal title and equitable title remain together in the persons whose names appear as the legal title holder. Unless there is a separation the legal and equitable interests remain together.

[Emphasis added]

- [18] As to the case for separation of legal and equitable interests, the Applicant, outside of a **PROSA** application, seeks a declaration that she is entitled to a 50% share in the Property; and orders relating to its sale to enable her to realise the value of her share. Although the Applicant does not say that her claim is being made pursuant to the **Partition Act** in either her Fixed Date Claim Form or the amendment thereto, as submitted by her Counsel, there is authority that a court would be permitted to have recourse to that legislation in determining the claim. In **Gerald Belnavis v Laverne Belnavis** [2013] JMSC Civ. 39, which is relied on by the Applicant, Morrison J, with whom I agree, quoted with approval the dicta of Brooks, J (as he then was) in **Paul Campbell v Dihann Campbell** SC 2000/E 528 who stated that “[i]t cannot be that this court is hamstrung in fulfilling its mandate because of the heading which the applicant chooses to use in filing his or her claim.”

[19] As a result of the Applicant's other *prima facie* claim to an interest in the Property, the Respondent would not be immune from litigation in respect of a division of the parties' respective interest in it. In these circumstances, to borrow the sage words of Sykes, J in **Smith v Service** "...the significance of the limitation period is reduced considerably. The limitation period would only apply to a claim under PROSA but would not have immunised him from suit at all."

[20] It was also submitted on behalf of the Respondent that to allow the application would automatically deny him of the claim he wishes to make, that he has adversely possessed any interest the Applicant had in the Property. This, it was said, would be significantly prejudicial to the Respondent. I do not find that there is merit in this submission.

[21] As stated previously, the Applicant has a claim to interest in the Property outside of **PROSA** to which the Respondent could make a claim for adverse possession in answer. Furthermore, I do not believe that a claim to possessory title through adverse possession would be lost to a Respondent on the claim for division of the matrimonial home under **PROSA**.

[22] While the starting point for division of the matrimonial home under the Act is on the basis of equal shares for each spouse, the Respondent, pursuant to section 7 is permitted to apply to vary that rule and the court is permitted to depart from it if there is good reason for doing so. So far as is relevant, section 7 states,

(1) *Where in the circumstances of any particular case the Court is of the opinion that it would be unreasonable or unjust for each spouse to be entitled to one-half the family home, the Court may, upon application by an interested party, make such order as it thinks reasonable taking into consideration such factors as the Court thinks relevant including the following –*

(a) *that the family home was inherited by one spouse;*

(b) that the family home was already owned by one spouse at the time of the marriage or the beginning of cohabitation;

(c) that the marriage is of short duration.

- [23] The list of factors which the court is able to consider in determining that it is reasonable and just to depart from the equal share rule are not limited to those appearing at paragraphs (a) to (c) of the quoted statutory provision. This I believe is made manifest in the legislature having preceded those considerations with the words, “*including the following*”. Further, the listed considerations do not appear to be *ejusdem generis* so as to exclude dissimilar circumstances from consideration; and there is nothing in the legislation which suggests that the interest of another spouse in the family home could never be acquired by the other through adverse possession.
- [24] Pursuant to section 12(2) of the **PROSA**, subject to section 9, which is not relevant to the immediate enquiry, a spouse’s share in property is to be determined at the date when the spouses ceased to live together as man and wife; and if they have not so ceased, at the date of the application to the Court.
- [25] Although a precise date is not given by either party to the application as to when they ceased cohabiting as man and wife, on either account, they would not have so cohabited after 1997. That is over twenty (20) years ago. It was on that occasion, as prescribed by section 12(2) that their respective shares in the Property would have been determined for the purposes of the **PROSA** and not the date of the Applicant’s application or the date her application was permitted to be made, with leave of the court. I do not believe that in these circumstances the Respondent would be barred from claiming that within the twenty (20) years that they ceased cohabiting as man and wife, which is the time her interest in the matrimonial home under the **PROSA** is to be determined, that he had acquired her interest by virtue of adverse possession. The Respondent’s complaint as to substantial prejudice is therefore without merit.

[26] It is in all these circumstances that I have formed the view that the overriding objective of the court to deal justly with matters is advanced by allowing all the matters in dispute between the parties to be put before the court for a final determination of the parties' claims on their merits. Accordingly, I make the orders below.

ORDER

1. The Claimant/Applicant's application for extension of time within which to make an application for division of the matrimonial property at 24 Kristan Circle, Cedar Grove Estate, Mandeville in the parish of Manchester, registered at Volume 1195 Folio 545 of the Register Book of Titles, under the **PROSA** is granted.
2. The First Hearing of the Amended Fixed Date Claim Form is to proceed.
3. Costs of the application to be costs in the claim.
4. The Applicant's Attorneys-at-Law are to prepare file and serve this order.